

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1372

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

FMC CORPORATION,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

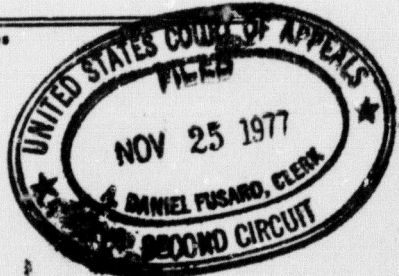
APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

This brief is submitted in reply to the Government's brief. Parenthetical page references used herein are to the Government's brief ("GB") and defendant's main brief ("FMC"). Unspecified parenthetical references are to the Joint Appendix.

Government's Statement of the Case (GB 1-11)

At the outset the Government betrays its misunderstanding of defendant's argument by reciting the facts which it claims demonstrate that defendant acted with either intent to harm birds or *mens rea* (GB 2-4). If these facts are conceded to have any bearing on the issues before this Court, then it also follows that the District Court should not have taken them from the consideration of the jury. Furthermore, the Government's recitation is so one-sided and inaccurate that a response is compelled.

Generally, the Government's factual presentation focuses on what it claims defendant should have done immediately upon discovery of dead birds. In this connection, it emphasizes only "the time period covered by the indictment" (GB 3) and that bird deaths continued to occur during that time despite defendant's efforts—now belittled by the Government—to alleviate the problem. The fallacies in this approach are that it ignores that bird deaths were unanticipated initially (331-37)¹; that carbofuran in the lagoon had resulted from increased wash down procedures implemented six months before the deaths (204-5); that when dead birds were discovered, the cause of death was not immediately ascertained until late May (209); that even if the plant had shut down its entire operation on the very first day of discovery, the source of death (toxic lagoon water) would have continued in existence (372-5); and that defendant did employ every single means suggested to it by the Government (82).

Nor do the specifics of the Government's Statement of the Case withstand analysis:

(1) It is claimed that DEC representative Harris "learned that waste water from the manufacture of carbofuran entered the holding lagoon" when he visited the premises on May 7 (GB 6). While he did seem to recall being told the quoted statement (114), he also said that he did not know which plant the carbofuran was manufactured in (115), did not know that carbofuran and dithiocarbamates were manufactured in different plants (116), and did not know of any treatment of carbofuran by caustic (117). Moreover, he apparently did not

¹ There is no better evidence of this than Judge Curtin's agreement, at sentencing, that the bird deaths were unanticipated (Index No. 14, p. 465).

care because he was not a sanitary engineer (117). Mr. Towns, a chemical engineer in charge of carbofuran production, later explained both the difference between waste water from the dithiocarbamate operation and wash down water from carbofuran, and the chemical process by which carbofuran was presumably being destroyed by caustic before entry into the lagoon (150-1, 171). On May 7, there was no reason to suspect carbofuran was the culprit because it was not supposed to be present in the lagoon (373). The fact that it was contained on a list of many other substances (Exhibit 12) is meaningless. Also on that list were ammonia and zinc derivatives which were the immediate suspects because of known fish toxicity attributable to those substances (210-11).

(2) It is claimed that defendant added to the problem by attracting birds with styrofoam floats on May 9 (GB 6). The testimony of U.S. Fish and Wildlife Agent Lisenbee was clear, however, that the floats were intended to frighten the birds away (65-6). It was not until May 29 that another governmental representative offered conflicting² thoughts (279).

(3) The Government argues that defendant knew of the presence of carbofuran in the lagoon within 3 to 5 days following May 13 (GB 7). Given the difficulties and dangers of caustic treatment of ten acres of water to remove the substance (222-4), defendant cannot be faulted for waiting until carbofuran was pinpointed as the cause of death.

(4) It is hinted that Dr. Stone suggested the means to detoxify and net the lagoon (GB 8). His advice in that regard was entirely conclusory: he merely said "get the toxin out"

² Consistency was also lacking among the Government's experts concerning Zon guns. While Lisenbee (75) and Stone (278) recommended them, the expert ornithologist, whose opinion was unknown to defendant until the trial, "deplored" such suggestions (240-1).

and cover the lagoon (281). The implementation was left to defendant. That detoxification was accomplished by the same chemical process previously used to destroy carbofuran in the sump (treatment with caustic) is an indication of the conceptual validity of the sump system.

(5) The Government apparently claims that the muffling of the Zon guns in light of the sheriff's and neighbor's complaints is also some support for arguing that defendant did not do all that was feasible to prevent deaths (GB 8). Even accepting the spurious logic that failing to do everything feasible leads to a conclusion of positive intent to harm birds, the Government would leave defendant with the Hobson's choice of prosecution for bird deaths or public nuisance.

(6) The Government is critical of defendant for failure to install "Avalarms" and a net within the period of the Indictment (GB 10). Given the fact that Agent Lisenbee was unable to suggest a source where these devices could be located (217-18) and the logistical problems of erecting a net (220-1), any inference of some adverse intent toward birds based on the fact of delay is ludicrous.

(7) The Government mistakenly asserts that the filter on the carbofuran sump was installed after the netting, well after the period of the Indictment (GB 10). In fact, the testimony was that the filter project was instigated "right after the 29th" (216) referring back to May 29 (215) when the pathologist had advised defendant of his conclusion concerning the cause of death (209).

The ultimate error is committed in the last sentence of the Government's factual statement: "Under these facts the Court properly refused to grant defendant's request for a charge related to accident." (GB 11). If the issue of accident was to

be determined based on any *facts*, it was the jury's province to do so. The jurors obviously wanted to consider the issue since they came back for further instructions in that regard (369). The Judge thereupon ruled the issue out of their minds as a matter of law (369).

GOVERNMENT'S ARGUMENT (GB 11-34)

1. Intent to do the Prohibited Act.

It is immediately apparent that the Government's brief is notable for the argument that it omits rather than for any which is made. The first point made in defendant's brief, running almost ten full pages in text (FMC 11-30), is that even if Congress intended to eliminate scienter or *mens rea*, the intent to do the prohibited act of killing migratory birds is necessarily required. One searches the Government's brief in vain for a cogent response to this argument. The Government reaches for the same "acme of absurdity" abhorred by Professor Mueller "in flagrant disregard of the fact that the mental process aspect of an act is something entirely distinct from *mens rea*." (FMC 16-17).

Examples of the prosecution's misunderstanding of the required intent to do the prohibited act are evident throughout its brief. *United States vs. Freed*, 401 U.S. 601 (1971) is cited (GB 12) because the Court required "no specific intent or knowledge that the hand grenades were unregistered". 401 U.S. at 607. However, as pointed out by defendant (FMC 12), the prohibited act is "possession" of grenades and knowledgeable possession was required. Justice Brennan, concurring, emphasized that possession had to be intentional (*Id.* at 612):

"The Government and the Court agree that the prosecutor must prove knowing possession of the items and also knowledge that the items possessed were hand grenades. Thus, while the Court does hold that no intent at all need be proved in regard to one element of the offense—the unregistered status of the grenades—knowledge must still be proved as to the other two elements."³

United States vs. Dotterweich, 320 U.S. 227 (1943) is cited as an example where "no specific intent" or "consciousness of wrongdoing" was necessary to sustain a conviction (GB 12). While "specific intent" and "consciousness of wrong-doing" are obvious references to *mens rea*, which was not required by the Court in *Dotterweich*, intent to do the prohibited act was not an issue. The statute involved (21 U.S.C. § 331) prohibited "introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded." Note that the prohibited act is either "introduction or delivery for introduction" of misbranded drugs. No question of intent to ship existed; the only issue was whether Dotterweich, as President and General Manager of his corporation, was vicariously liable as an aider and abettor (320 U.S. at 284).

It is claimed that the limited-count hunting cases stand for the proposition that "intent is not an element necessary to establish a violation of the act" (GB 16). At most those cases eliminate only scienter. In *United States vs. Schultze*, 28 F. Supp. 234 (W.D. Ky. 1939), for example, the only argument made by the hunters-defendants was that "scienter is an essential element." 28 F. Supp. at 235. The strained analogy

³ The other interesting aspect of *Freed* is the conclusion of Justice Douglas that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." 401 U.S. at 609. Can the same statement be made concerning the unintentional killing of birds?

(GB 16) between a hunter who intends to kill and defendant which intended only to protect its workers' health is tenuous.

The attempted distinction (GB 34) of *State vs. American Agr. Chemical Company*, 110 S.E. 800 (Sup. Ct. S.C. 1922) (FMC 15-16), also betrays the Government's avoidance of the prohibited act—intent issue. The South Carolina Court found the pollution statute in question to be *malum prohibitum*, but even so said that the elimination of criminal intent (i.e., *mens rea* or *scienter*) must not be "confounded with or deemed decisive of the very distinct inquiry whether or not the accused has in fact exercised his personal volition or been negligent . . ." (110 S.E. at 802). The court also noted that an accident would presuppose absence of both volition and negligence (*Id.*). Admitting the validity of this holding and conceding that the concentration of carbofuran in the lagoon was "accidental," the Government still argues that the measures taken by defendant were ineffective and there was, therefore, no accident as a matter of law (GB 34). Considering the lack of previous deaths, the size of the lagoon, the difficulties in establishing cause of death, building the net, and neutralizing the lagoon, the contention that defendant's acts to prevent future deaths rise to the level of either volition or neglect is illogical. At the very least, defendant was entitled to have the jury consider these issues. *United States vs. McKenzie*, 301 F.2d 880, 882 (7th Cir. 1962) ("No matter how conclusive the evidence may be in a criminal case on a controverted material fact, the trial judge cannot make the finding or withdraw the issue from the jury.")

2. *Mens Rea.*

The Government's argument that Congress can constitutionally eliminate *mens rea* or *scienter* (GB 15) is not

disputed. Nor is there any dispute concerning the *Morissette* rule that failure to mention intent is not dispositive. The question then is, did Congress intend either unintentional or accidental killing to be a crime?

The Government's principal reliance in arguing that Congress intended to regulate non-hunting practices is based on the conventions and statutes which have uniformly protected non-game as well as those ~~species~~ which are usually thought to be the objects of hunters (GB 18-21, 24, 28). The error in this argument is that there are many reasons why hunters sought to kill both insectivorous birds and "other" non-game species. One is suggested by Ossa, *They Saved Our Birds* (1973) (GB 24) at 24:

"During the fall and winter of 1886, at least five million birds were slaughtered in this country for womens' hats. On two February afternoons in New York's uptown shopping district, Frank Chapman, then a banker and volunteer worker for the American Ornithologists' Union, achieved the most extraordinary bird list of all time. For he noted more than 160 birds on womens' hats, including four robins, one thrush, three bluebirds, one blackburnian warbler, one blackpoll warbler, three scarlet tanagers, one bankswallow, one bohemian waxwing, twenty-three cedar waxwings, one northern shrike, one pine grosbeak, fifteen snow buntings, two tree sparrows, one white-throated sparrow, one bobolink, two meadow larks, nine Baltimore orioles, five purple grackles, five bluejays, one scissor-tailed flycatcher, one kingbird, one kingfisher, one pileated woodpecker, two red-headed woodpeckers, twenty-one flickers, one saw-whet owl, one eastern mourning dove, and forty-nine shore and game birds.

In that year, as in the past several years, gunners along the northeast coast made up to \$50 a week by shooting birds to death, and almost succeeded in eliminating the

tern and the gull. Along the southern shores, as terrible a devastation was made among egrets and herons."

Most of the species enumerated by Ms. Ossa are non-game birds. See Article I of Convention with Great Britain of August 16, 1916; also, 50 C.F.R. § 10.13. That the Bird Act was aimed at hunters of all species is also evident from the remarks of Representative Stedman (GB 26):

"Where are they now? . . . Whither have they flown? The answer will be found in the avarice and brutality of man in their *slaughter for sale* and for sport, unrestricted by regulations of any kind." [Emphasis added.]

The Congressional Record for June 4, 1918 (56 Cong. Rec. 7356-81) covering the principal House debate on the bill, contains repeated references to hunting and other terms employed with obvious reference to hunting: "indiscriminate and wholesale slaughter" (7361); "[h]unters have helped to exterminate them" (7363); "many are destroyed just simply for the fun of shooting" (7370); "the cockrobin [an insectivorous bird under Art. I ¶ 2 of the Convention with Great Britain] . . . is slaughtered by the tens of millions for food" (7375).⁴ The fact that one Congressman asked a hypothetical question concerning the possible killing of a bird "without guilty intent" (GB 28) does not mean that the hypothetical killer was not a hunter nor does it evidence Congressional purpose to do away with the required intent to kill a bird. At most, it is some evidence that the legislature intended to avoid traditional *mens rea*. See *Morissette vs. United States*, 342 U.S. 246, 252 (1951), where language similar to "guilty intent" is said to be the equivalent of scienter.

⁴ Further detail on the decimation of the robin is provided in the Congressional Record for the Senate on July 9, 1917 (56 Cong. Rec. 4820). There is a hunter's anecdote therein quoted where the author speaks of one hunt, two hours in duration, resulting in "a total slaughter of 10,157 birds."

While the Government emphasizes the relative minor penalties imposed by the statute in order to fall within that aspect of the *Morissette* rules for definition of a public welfare offense (GB 12), it fails to recognize that the present Indictment, which involves cumulative liability, flies in the face of Congressional intent (56 Cong. Rec. 7452, 6/6/18):

"Mr. FLOOD. Mr. Chairman, I do not think the suggestions made by the gentlemen from Illinois [Mr. Graham] that this is a very severe penalty is tenable. The maximum fine cannot be but \$500 . . . The court could fine \$1 . . . It is idle, therefore, to complain of the severity of the penalty."

See also, *United States vs. Schultze*, *supra*, 28 F. Supp. at 236 ("This construction does not carry with it any severe or harsh penalty on the part of innocent offenders.") If relatively minor penalties are consistent with a Congressional intent to eliminate *mens rea* then the present indictment is the antithesis to such a purpose.

The Government reads *Allen vs. Merovka*, 382 F.2d 589 (10th Cir. 1967) (GB 32-3; FMC 23, 25) too narrowly. In *Allen* plaintiffs sought to enjoin federal game wardens from trespassing to enforce regulations under 16 U.S.C. § 704 claiming that the regulations should not be read to prohibit hunting on their land in spite of the close proximity of a State wildlife refuge where the State maintained baited fields. The Court reversed the District Court's granting of summary judgment to defendants, holding, *inter alia*, that the "prohibited acts refer to those of the hunter, not to the independent and unrelated acts of others" (382 F.2d at 591). Despite the Government's contention to the contrary (GB 32), the Court did not limit its holding merely to the regulations (*Id.*):

"Since the Act and the regulation pertain to the hunting methods as above described, they were not applicable to the appellants . . ." [Emphasis added.]

In effect, the Court held that the absence of a volitional act by the hunters, the baiting having occurred by State agents, rendered them immune from prosecution under the Act. For this reason, the Court distinguished *Cerritos Gun Club vs. Hall*, 96 F.2d 620 (9th Cir. 1938) (GB 31-2) and other baited field cases (382 F.2d at 591).

The Government unduly limits defendant's argument concerning resolution of doubt about Congressional purpose "in favor of lenity" (GB 15; FMC 27-29). While some degree of uncertainty does exist merely because Congress failed to employ language of intent, doubt occurs primarily because of the absence of any indication by Congress that it wanted "to give protection to birds from all forms of death other than natural disaster" (GB 21; Emphasis added.) If that were the intent of Congress there would be serious constitutional questions raised concerning the vagueness of the language employed since a fair warning to potential defendants (be they drivers, pilots, farmers, builders or pesticide manufacturers) is lacking. *Bouie vs. Columbia*, 378 U.S. 347 (1964) (FMC 20).

Respectfully submitted,

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Patricia A. Lacey

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NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1978.

